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CASES CITED

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CASES (Continued)

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 23,724

RALPH STELL, A MINOR, BY NEXT FRIEND, ET AL.,

Appellants,

versus

LAWRENCE ROBERTS, A MINOR, BY NEXT FRIEND, ET AL.,

Appellees,

BOARD OF EDUCATION FOR THE CITY OF SAVANNAH AND THE COUNTY OF CHATHAM, ET AL.,

Appellee,

UNITED STATES OF AMERICA,

Appellee.

Appeal from the United States District Court for the Southern District of Georgia

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REPLY BRIEF FOR APPELLEES, LAWRENCE ROBERTS, ET AL.

STATEMENT OF THE CASE

The "Printed Record" was filed in the Office of the Clerk for the Fifth District Court of Appeals in December, 1966. A "Supplemental Printed Record" was filed in the Office of the Clerk in March, 1967. It contains the

final order of Judge Scarlett dated April 1, 1966. However, it did not include as an appendix or otherwise "the revised 'Plan of Desegregation' submitted by the intervening White children and approved by counsel for the defendant School Board" which on that date was "allowed and approved and — made a part" of the judgment of April 1, 1966. (See Supplemental Printed Record, p. 27.)

The order of April 1, 1966 (Supplemental Record, p. 8) recites:

> "Since the order of August 23rd is binding upon all parties in this case, and this order merely supplements it, a copy is attached hereto for convenience."

On April 6, 1967, a "Second Supplemental Printed Record" was filed with the Clerk of the Fifth Circuit Court of Appeals which contains the decision of Judge Scarlett dated August 23, 1965, "disapproving and disallowing the plan of desegregation submitted by the defendant Board of Education".

On pages 12, 13, 14, 15, 16, 17 and 18 of the "Second Supplemental Printed Record" the "ORDER ON DESEGREGATION PLAN" allowed and approved by Judge Scarlett in his order of April 1, 1966, appears.

For clarity, the decision of Judge Scarlett of August 23, 1965, appearing in the "Second Supplemental Printed Record" should have been printed first, and following that Judge Scarlett's decision of April 1, 1966, and following that the "ORDER ON DESEGREGATION

PLAN", as an appendix to the order of April 1, 1966, should have been printed.

Those three documents constitute the only orders and judgment that could have been appealed from and they should have appeared in the record in the order stated.

"Plaintiffs' Objections to Interveners Desegregation Plan" appearing on page 142 of the "Printed Record" states that on August 23, 1965, the Court approved "a plan submitted by interveners and providing, inter alia, that the qualifications and abilities of students be taken into consideration in assignments". The Objection also recites that at a hearing on November 3, 1965, (Printed Record, p. 143):

> "The School Board's attorney, Basil Morris, also without prior notice to counsel for plaintiffs, then announced to the Court that he had examined the Order on Desegregation Plan submitted by interveners, had determined that such plan was not objectionable as far as the School Board was concerned, and therefore, upon the signing of the plan by the Court, he would abandon his motion for a new trial and motion to amend judgment filed on September 1st."

This is a correct statement of what occurred in open court on November 3, 1965. As stated by Judge Scarlett in his order of April 1, 1966 (Supplemental Printed Record, p. 3):

> "On November 3, 1965, another hearing was

held at which a revised plan of desegregation approved by counsel for defendant Board of Education and counsel for the White interveners was submitted to the Court. At said time counsel for plaintiffs requested additional time to study the proposed plan and to file objections thereto if desired. Said request was granted."

Apparently the "Plaintiffs' Objections to Interveners Desegregation Plan" (Printed Record, p. 142) was overlooked by Judge Scarlett when preparing his opinion of April 1, 1966, (Supplemental Record, p. 3).

The brief for the Justice Department correctly states the facts as follows, (pp. A-6 and A-7):

"In response to the court's order, the board on September 1, 1965, filed a motion for a new trial and a motion to amend the court's judgment (R. 131-136). On November 3, 1965, another hearing was held. At this hearing the white intervenors submitted a desegregation plan in which the board concurred (R. 143). The board thereupon withdrew its prior motions. On November 9, 1965, the United States filed a motion to intervene pursuant to section 902 of the Civil Rights Act of 1964, 42 U.S.C. 2000h-2, (R. 139-140) which was granted on November 15, 1965. The United States, together with its motion to intervene, filed objections to the plan submitted on November 3, 1965 (R. 141-142). The plaintiffs also filed objections to that plan (R. 142-144) and, in addition, moved for further relief. The plan was then withdrawn

and amended to meet some of the objections and on November 17, 1965, was resubmitted."

Judge Scarlett's order and judgment of April 1, 1966, points out (Supplemental Printed Record, p. 4) that after the intervention and objections by the United States were presented to the Court November 3rd, "the plan submitted on November 3rd was withdrawn, revised and resubmitted to the Court". The Court further states: "No formal objection to the revised plan has been filed." The Court then sets forth (Supplemental Printed Record, p. 4) the objections to the plan of November 3rd filed by the Attorney General in behalf of the Justice Department. Those objections are set forth in seven subparagraphs under paragraph (9), (Second Supplemental Printed Record, p. 4). Thereupon, Judge Scarlett recites in paragraphs (10), (11) and (12), the manner in which the revised plan of desegregation (Second Supplemental Printed Record, p. 12) undertook to satisfy the criticisms contained in the objections filed by the Justice Department.

No other material changes whatsoever were made in the plan originally submitted by the White interveners and agreed to by counsel for the School Board. For example, the revised "Plan of Desegregation" submitted after the United States filed its objections contained the same identical paragraph 14 exactly as it was stated in the plan of November 3rd.

For convenience, paragraph 14 of the plan of November 3, 1965, and of the revised plan approved by Judge Scarlett April 1, 1966, (Supplemental Printed Record, pp. 2 and 27) is here copied:

"14. In addition to the criteria hereinbefore set forth, the Defendant Board shall in making or granting assignments and/or transfers take into consideration the similarity of mental qualifications, such as intelligence, achievement, progress rate and other aptitudes, such to be determined upon the basis of Nationally standardized tests. No student shall have the right to be assigned or transferred to any school or class the mean I.Q. of which exceeds the I.Q. of the student, nor shall a student be assigned or transferred to any school or class, the mean I.Q. of which is less than that of the student, without the consent of the parent or guardian. New students coming into the system or moving from one district to another shall be assigned to their normal neighborhood school. If a new student is not satisfied with his school assignment, then his case will be handled as that of any other student requesting a transfer." (Second Supplemental Printed Record, p. 17)

Counsel for the intervening White children has been unable to determine either from the record or from the brief filed in behalf of the appellant Board of Education of the City of Savannah and County of Chatham just what appeal and what assignments of error are relied upon by counsel for the School Board.

If counsel for the defendant School Board desired to withdraw his withdrawal of his motion for new trial, which agreement and stipulation were relied on by Judge Scarlett and others, to say the least, he was required to file a motion for that purpose. None was filed

and the appeal of the School Board fails. If the motion of September, 1965, (Printed Record, p. 131) which was withdrawn on November 3, 1965, (See Printed Record, p. 143, and above citations) is to be relied on now for purposes of jurisdiction, we are in the midst of chaos and old night.

While it is true, as pointed out by counsel for appellants, Ralph Stell, et al., (p. 7 of their brief) that the plaintiffs-appellants did file objections to the plan filed on November 3, 1965, (Printed Record, pp. 142-143), their so-called "objections" were (Printed Record, p. 144):

"Plaintiffs object to such plan as entirely in conflict with the Fifth Circuit's orders in this case and any other applicable decisions. The plan, if approved, would virtually remove the freedom of choice required by the Fifth Circuit and replace it with what would amount to a pupil assignment plan under which pupils would initially be assigned to segregated schools and/or classrooms. Pupils desiring transfers would be subjected to onerous requirements and such transfers would be subject to so many tests and subjective standards as to permit no objective review of the basis for such assignments."

Not one of these "objections" has merit.

As pointed out by Judge Scarlett (Supplemental Printed Record, p. 4) after the plan of November 3rd was withdrawn, revised and resubmitted to the Court "no formal objection to the revised plan has been

filed". As noted above, the revised plan, therefore, was approved by the School Board and was not formally objected to either by Stell or by the Justice Department. The objections filed on November 9, 1965, by the Justice Department were met by the revision of November 17, 1965. The proposed Findings of Fact filed on January 20, 1966, by the Justice Department (Printed Record, p. 146) was based principally on evidence rejected by Judge Scarlett, and now conceded to be inadmissible. (P. 7, Brief of Justice Department)

We quote from the order of Judge Scarlett filed April 1, 1966, (Supplemental Printed Record, p. 5):

> "At the hearing on December 29th in Brunswick, the following stipulation was entered into in open Court:
>
> 'All parties agree that there shall be submitted to Honorable F. M. Scarlett, United States District Judge, the following questions for determination in the above stated case:
>
> 1. The admissibility, particularly with reference to Rule 26, of the depositions taken in Savannah, Georgia on December 22, 1965, upon notice by the Government and the exhibits referred to therein and if such depositions are admitted then the questions as to relevancy and materiality thereof;
>
> 2. All Motions pending in the above stated case, including the motion filed by Plaintiff to Dismiss the Defendants Intervener as parties, if such motion is still pending;

> 3. The approval of a plan for desegregation.
>
> It is further agreed that briefs shall be filed and served upon opposing Counsel not later than January 20, 1966 and any reply briefs shall be filed and served not later than January 31, 1966.'
>
> (14) Said stipulation was not made a formal order of Court at that time but was subsequently approved and sanctioned by the Court in order that the record might be brought to a close in an orderly manner within time limits fixed by the Court. Within the time allowed under the order of Court the Justice Department filed with the Court a proposed plan for desegregation. The Board of Education submitted the same plan as that disallowed by the Court in its order of August 23rd. No plan of desegregation has been submitted by the plaintiffs at anytime since the pendency of this litigation."

The Justice Department, so far as the *Record* in this case discloses, has no appeal pending. The defendant School Board has no appeal pending. The plaintiff has no appeal pending as to the ruling of August 23, 1965, which became the law of this case.

The Editors of West Publishing Company edited and reported the decisions of Judge Scarlett now under consideration, the same being *Stell vs. Savannah-Chatham County Board of Education,* (August 23, 1965

ruling) in 255 F.Supp. 83; and (the April 1, 1966 ruling) 255 F.Supp. 88. They did an excellent job.

We quote pertinent headnotes 1, 2, 3 and 4, appearing on page 83 of the first case:

> "1. If integration of schools may be accomplished by the assignment of individual students to particular schools on basis of intelligence, achievement or other aptitudes upon a uniformly administered program without race being a factor in making of such assignments, such assignments may and should be made where evidence shows considerable variation in achievement.
>
> "2. Court takes judicial notice of fact that in all well-regulated school systems at all times school children in general and regardless of race are permitted to progress on basis of intelligence, ability, achievement or other aptitudes.
>
> "3. Plan for school integration which took no account of age and qualifications and the permissible criteria for classification, other than race or color, was disapproved, and city-county board of education was ordered to promptly submit plan of desegregation in which race or color would not be factor and which would assure that integration might be accomplished in such manner as to provide the best possible education and greatest benefits to all school children without regard to race or color but with regard to similarity of ages and

> qualifications. Civil Rights Act of 1964, Section 201 et seq., 42 U.S.C.A. Section 2000a et seq.
>
> "4. Where it appeared at trial of case relating to desegregation of school system that Negro teachers' mean annual salary markedly exceeded that of white teachers and that Negro principals assigned relatively lower competence ratings to Negro teachers under their supervision than white principals assigned to white teachers under their supervision, board of education plan for desegregation of district should provide that discrimination in favor of Negro teachers and against white teachers should be terminated."

The relevant and pertinent headnotes 5, 6 and 7, appearing on page 89 of the second case, are:

> "5. School children may be assigned to particular schools on basis of intelligence, achievement or other aptitudes upon a uniformly administered program, provided race is not a factor in making the assignment.
>
> "6. County board of education and their agents were enjoined from maintaining in operation of county school system any distinction based on race or color but were enjoined and required to maintain and enforce distinctions based on age, mental qualifications, intelligence, achievement and other aptitudes upon a uniformly administered program.
>
> "7. County board of education was required to

employ Negro and white school teachers in accordance with identical standards and was specifically required to terminate practice of employing Negro school teachers with a minimum grade of 400 on the National Teachers Examination while requiring white applicants to have a minimum grade of 500 on the same examination and to further abolish every rule or policy under which Negro applicants for school teacher positions were accorded preference over white applicants as a result of race and color."

QUESTIONS AT ISSUE

The stipulation, copied in the order of Judge Scarlett filed April 1, 1966 (Supplemental Printed Record, p. 6) set forth the questions to be determined by Judge Scarlett. The only issues before this Court, so far as we can find, are those made by plaintiffs - appellants in their Notice of Appeal (Printed Record, pp. 10-11). That notice refers only to Judge Scarlett's April 1, 1966, supplemental decision. The ruling of August 23, 1965, is unexcepted to and is, therefore, the law of the case.

ARGUMENT

We argue this case as if the two decisions of Judge Scarlett had been properly appealed and are in controversy here. By doing so, we make no admission nor waiver. We insist that those who champion the cause of White people and those who champion the cause of Colored people should be guided by the same rules of court.

I. THE MOTION BY PLAINTIFF TO DISMISS INTERVENORS

The decision by the Fifth Circuit Court of Appeals in *Stell vs. Savannah-Chatham County Board of Education,* 333 F.2d 55 (1964), became *the law of this case* and continues to be the law of this case without regard to anything said or held in any other decisions involving other parties. That decision relates to both the *Savannah* case and a *Glynn County* case. In the *Savannah* case White children were permitted to intervene. In the *Glynn County* case Negro school children were permitted to intervene. The Glynn County School Board objected to the intervention by Negro school children. This Court held (p. 60) "that the intervention by the colored school children was warranted by the facts of the case". Judge Scarlett's order allowing the intervention by the white school children in Savannah was not assigned as error and it became *the law of this case.* Any subsequent efforts by plaintiffs to dismiss the intervention by Lawrence Roberts, et al., were and are frivolous and wholly without merit. An order of court allowing an intervention does not require reissuance or reactivation in order to be valid and binding.

II. THE RULING FORBIDDING DISCRIMINATION IN EMPLOYMENT AND PAY OF WHITE SCHOOL TEACHERS

There is no dispute about or denial of these facts: (1) White teachers of greater competence in Savannah are systematically paid lower salaries than Negro teachers of lower competence, (Second Supplemental Printed Record, pp. 11, 12, and 255 F.Supp. 83(4) and 88); and (2) In order to be employed to teach in the Savannah-

Chatham County Schools a Negro applicant is required to score a minimum of 400 on a scale of 1000 on the National Teachers Examination, while White applicants are required to score a minimum of 500, (Supplemental Printed Record, p. 12, and 255 F.Supp. 89, 91, 93, 99).

What possible objection can there be to an order requiring school authorities of Savannah to employ and pay White and Negro school teachers in accordance with identical standards?

Everyone surely agrees that the practice now in effect should be forbidden. Counsel for the defendant School Board made no explanation of or apology for such discrimination. When the School Board procured a stay of the judgment of Judge Scarlett, it asked that it all be stayed. Counsel for both the plaintiffs and the Justice Department joined in the request for the stay. Surely this Court did not mean to sanction such discrimination when it stayed the orders forbidding it. We decline to argue the point on such an assumption.

III. ASSIGNMENTS OF SCHOOL CHILDREN

Counsel for appellants, Lawrence Roberts, et al., adopt and urge upon this Court the decision of Judge Scarlett dated August 23, 1965 (Second Supplemental Printed Record, pp. 1-12), unexcepted to here, and the decision of Judge Scarlett dated April 1, 1966 (Supplemental Printed Record, pp. 1-27), together with the Order on Desegregation Plan approved on April 1, 1966, (Second Supplemental Printed Record, p. 12).

This Court ruled in *Stell vs. Savannah Board of Education,* 333 F.2d 55, 61, 62:

> "— there is no constitutional prohibition against an assignment of individual students to particular schools on a basis of intelligence, achievement or other aptitudes upon a uniformly administered program but race must not be a factor in making the assignments. However, this is a question for educators and not Courts."

Judge Scarlett based his rulings on that case.

It is argued that when this Court held that assignments of school children based on intelligence, achievement or other aptitudes without race being a factor is "a question for educators and not Courts", (333 F.2d 62 (1964)), the District Court has thereby forbidden to consider the question, or the evidence touching upon it. All of the evidence of "educators" demanded the decision rendered. Courts are guided by evidence.

Counsel for plaintiffs-appellant contend that school board members are the "educators". They apparently overlooked the fact that school board members are more often shoe clerks, sextons, farmers or merchants than "educators".

According to the record in *Stell vs. Savannah Board of Education,* Civil Action No. 1316, reported in 220 F.Supp. 667 (1963), the undisputed and unchallenged testimony of "educators" upon the exact point was heard. (The Transcript of the Proceedings before Judge Scarlett upon which his decision, reported in 220 F.Supp. 667, was based became a part of the official Transcript of Proceedings filed in this Court in *Stell*

vs. Savannah-Chatham County Board of Education, 333 F.2d 55 (1964). The "educators" whose testimony constituted the basis for Judge Scarlett's decision were:

(1) Dr. R. T. Osborne, Professor of Psychology and Director of the Student Guidance Center at the University of Georgia, (Transcript of Proceedings, filed in 333 F.2d 55, p. 99);

(2) Dr. Henry E. Garrett, visiting Professor of Psychology at the University of Virginia, Professor Emeritus of Psychology at Columbia University where he retired after 30 years. He is a former president of American Psychological Association, (Transcript on former appeal of this case, p. 127);

(3) Dr. Clairette P. Armstrong, professional Clinical Psychologist, former Chief Psychologist at Bellevue Hospital, (Transcript of Proceedings in former appeal, p. 177);

(4) Dr. Wesley Critz George, former and Emeritus Professor of Anatomy, School of Medicine of the University of North Carolina, particularly Professor of Histology and Embryology in the Department of Anatomy at North Carolina. In addition to his North Carolina University teaching, Dr. George had taught at Princeton, The University of Georgia and the University of Tennessee Medical School. (Transcript of Proceedings on former appeal, pp. 191, 192); and

(5) Dr. Ernest van den Haag, Sociology Professor at New York University, and a lecturer at the New School for Social Research. His specialty was sociology and social philosophy and psychoanalysis. He had

taught also in the Graduate Division of Brooklyn College, at City College in New York and at the University of Minnesota. He had lectured also at Harvard and Yale. (Transcript of Proceedings on former appeal, pp. 218, 219.)

According to the testimony of Dr. Osborne, in 1953 the University of Georgia instituted a comprehensive longitudinal study of differences in mental growth and school achievement in Savannah-Chatham County Schools. More than 800 White and Negro children were tested to determine patterns of intelligence in school achievement growth over a period of several years. Two experimental groups of White and Negro children were grouped for sex and intelligence and were examined successively over a six-year period in order to determine what, if any, school achievement variations occurred over that period. (See Interveners' Exhibit 1, p. 267, Transcript of Proceedings on former appeal of this case.) We quote from page 5 of the exhibit:

> "the Negro-white achievement differences of almost two years at grade six increased steadily until at grade twelve the difference in reading level was over three school grades. This widening gap in achievement between the two groups is apparent on both vocabulary and comprehension subtests as well as for the total reading scale.
>
> "The pattern in arithmetic (Figure 2) is the same as for reading. In the sixth grade white-Negro differences were just over one grade for the areas covered by the California Arithmetic Test. In the eighth grade the two groups main-

tained relative positions in arithmetic reasoning but on the tests of arithmetic fundamentals the Negro group was now nearly two grades behind the white pupils. Six years after the first test when both groups were examined during the second semester of the twelfth school year there was a difference in arithmetic achievement of almost four grades between the two groups. The arithmetic grade placement of the average Negro twelfth grade pupil was below the eighth grade national norms while the white group tested above the eleventh grade on the same norm group. In other words, in terms of arithmetic skills, especially fundamental operations involving only numbers, white children in the eighth grade were not only significantly above the eighth grade Negro group, but they were also superior in arithmetic skills to tenth and twelfth grade Negro pupils.

"Growth patterns of mental ability grade placement for the two groups are seen in Figure 3. The difference in mental maturity of over two years at the sixth grade (1954) was slightly attenuated at the eighth grade testing (1956), but by the second semester of the tenth grade (1958) the means of the two groups are separated by over three years. The same relative position of the two curves was maintained through the last testing period of the experiment, twelfth grade (1960). By the time the students were examined at the tenth grade there was practically no overlap in I.Q.; that is, only one tenth grade child in the white group earned an I.Q. below the median I.Q. of the Negro

children in the same grade. At the tenth grade only one per cent of the Negro pupils equalled or exceeded the median I.Q. of the whites (Table I)."

This is a part of the evidence considered and given effect to by Judge Scarlett in his decision of August 23, 1965 (Second Supplemental Printed Record, pp. 5, 6, 7 and 8).

Immediately after Dr. Osborne left the stand, Dr. Garrett was called to the stand, whereupon Mrs. Motley, leading counsel for plaintiffs, admitted his qualifications and also stipulated:

> " — negroes, generally, on achievement tests, do not perform as well as whites — we will stipulate that. He doesn't have to testify to it. We will agree to that."
> The Court: "Agree to what?"
> Mrs. Motley: "That these tests, which have been administered, show that negroes generally, do not perform on the achievement tests as well as whites." (Transcript of Proceedings on former appeal, p. 134)

The Court accepted the stipulation but continued to hear the evidence.

Dr. Garrett then testified that the mental differences demanding different scholastic treatment, shown in Savannah by the University of Georgia *Study,* had been shown to exist elsewhere in the same degree by numerous studies.

The next witness called was Dr. Wesley C. George. His qualifications as an expert were conceded by Mrs. Motley, as were those of Dr. Osborne and Dr. Garrett and all the other expert witnesses. He proceeded step by step to survey the relationship between brain weight and body weight and brain structure in the make up of intelligence throughout the animal kingdom. He discussed the structure and importance of the different areas of the brain and the differences between Negro and Caucasian brains. Here is a sample of his testimony:

> "The pre-frontal portion of the frontal lobes, (of the brain) while contributing to the elaborateness of movement, bestows upon an individual an ability to plan and to look ahead, a capacity for perceiving a stimulus or problem, not only as an event of the present, but in relation to past experience and anticipation of future possibilities and the ability to maintain a steadfastness of purpose in the face of distractions and an ability to adjust himself agreeably to his neighbors and to control his emotional reactions."

In that connection he agreed with Dr. Talmadge Peele, Neurologist at Duke University Medical School, who published an article in 1961 expressing the same views stated by Dr. George. Dr. George testified, without dispute, that there are significant differences between the size and structure of white and Negro brains and particularly those portions of the frontal lobes concerned with ability to plan and look ahead. Those portions of negro brains are smaller and less complex in structure than white brains. Dr. George then surveyed like findings of other scientists both in America and Europe. Dr. George was then asked this question:

> "Q. Doctor, I will ask you whether or not these differences in brain structures are inherited or are they the result of environment?
> "A. Well, in my mind, there is no doubt that they are inherited.
> "Q. Can those differences, in your opinion, be modified by environment?
> "A. To a minimal degree.
> "Q. Over what period of time?
> "A. — to increase the inherited basis would require, perhaps, a hundred thousand years to allow time for the concurrences of mutations and the survival of beneficial mutations. We all have brains which we subject to experience and to education and it is reasonable to suppose that education and experience influence to some extent the structures of the brain, but there is no evidence that it increases its mass in any significant degree."

Those who may wish to explore the matter in greater depth should read the recent book by Carleton Putnam entitled "Race and Reality", (Public Affairs Press, Washington, D.C., 1967, $4.50). Much of this book relates to the trial of the *Stell* case in Savannah. It is classic.

In the first *Savannah* decision, (220 F.Supp. 667 (1963)), Judge Scarlett held that since differences in learning capacities is a racial characteristic, and since Negroes are black, and Caucasians are white, color alone might be used as convenient sorting criteria. On

appeal, this Court held that regardless of convenience, "race and color" may not be used. But the Court held that "mental qualifications" might be used as sorting criteria.

Hon. Frank M. Scarlett held that in view of the evidence and in view of the Fifth Circuit decision that "race and color" may not be used as sorting criteria, but in view of the same case "educational qualifications" may be used. Therefore, only those children having *substantially the same progress rates and "similar age and mental qualifications"* should be permitted to transfer from their own neighborhood schools to other schools. Assignments and transfers out of their own neighborhoods in Savannah were thus restricted to those pupils, black or white, whose I.Q. equals or exceeds the median I.Q. of the school to which transfer is sought. In other words, the quality of schools was not to be impaired by bringing in children from other neighborhoods who cannot keep up.

According to the contention of counsel for plaintiffs, in their brief, (p. 13) "mean I.Q." means "average I.Q." That is wrong. It means the *middle number*. Fifty percent are above and fifty percent are below. If there are 101 in a class, the "mean" or "median" I.Q. is that of the child who stands 51st in his or her class.

Separation and classification by "educational qualifications" is and has always been considered basic to any effective education program everywhere, in all cultures. It is not always convenient but it may be accomplished under any competent school administration. Savannah has all of the data on I.B.M. cards needed for the purpose. The claim of hardship is a sham.

Such a classification permits children to progress in accordance with their ability whether normal, above normal, or subnormal. It does not penalize excellence nor judicially impose mediocrity. It does not impair the educational opportunities of any child.

IV. THE IMPORTANCE OF THIS CASE

In their brief, counsel for plaintiff-appellants assert (p. 16), "— this is in no way an ordinary school case". They are in no way singular — the Justice Department and Office of Education fully agree with them. The Office of Education of the Department of Health, Education and Welfare of the United States Government has spent millions on *Studies* in an effort to prove that what was alleged and proved under oath without dispute in Savannah and what was stipulated to be true was not true, but that *all races and all children are equal,* and hence all have the same progress rates and are equally educable; that any differences that may be shown are wholly attributable to environment, curable by money, and not to heredity, curable by God and centuries.

The first scholarly *Study* underwritten and published by the Office of Education was "Project Talent" made under the supervision of George R. Burket, of the University of Pittsburgh. The purpose of it, as stated on its front page, was to display "differences and similarities in schools having varying proportions of Negro enrollment". Instead of disproving what was proved in *Savannah,* it documented and proved the very same thing. It gave the results of tests conducted in 773 public senior high schools *in every section of the United States* which showed the facts as to dissimilar

educational qualifications between Negro children and White children to be almost exactly as proved and stipulated in Savannah. It proved that the average Negro child cannot keep up with the average White child in school and *that massive integration of races destroys the educational opportunities of all school children.*

That study caused consternation in Washington. It was withdrawn from the press and was finally suppressed by the Office of Education! Hearing about it, counsel for interveners, writing this brief, wrote for a copy. He was told in writing that it was "out of print".

A copy was found and introduced in evidence. It investigated and made findings on substantially the same questions investigated by Judge Scarlett in this case. Judge Scarlett referred to and quoted from that *Study* both in his decisions of August 23, 1965, (Second Supplemental Printed Record, pp. 8, 9) and in his decision of April 1, 1966, (Supplemental Printed Record, pp. 16, 17, 18 and 19). Inasmuch as this *Study* was suppressed by the Office of Education, we attach to this brief, as an appendix, the front cover and the first eight pages which we urge this Court to read.

After "Project Talent" was published and suppressed, the Office of Education was forced to make and to publish an additional and similar study under the provisions of Section 402 of the Civil Rights Act of 1964. Since that *Study* was required by an Act of Congress, it could not be suppressed and may now be used as an official reference without introduction in evidence. That *Study* consisted of 737 pages. It was released on July 2, 1966, over the signature of Harold

Howe II, U. S. Commissioner of Education. We quote from page 21 of that Study:

> "With some exceptions — notably Oriental Americans — the average minority pupil scores distinctly lower on these tests at every level than the average white pupil. The minority pupils' scores are as much as one standard deviation below the majority pupils' scores in the 1st grade. At the 12th grade, results of tests in the same verbal and nonverbal skills show that, in every case, the minority scores are farther below the majority than are the 1st-graders. For some groups, the relative decline is negligible; for others, it is large.
>
> "Furthermore, a constant difference in standard deviations over the various grades represents an increasing difference in grade level gap. For example, Negroes in the metropolitan Northeast are about 1.1 standard deviations below whites in the same region at grades 6, 9, and 12. But at grade 6 this represents 1.6 years behind; at grade 9, 2.4 years; and at grade 12, 3.3 years. Thus, by this measure, the deficiency in achievement is progressively greater for the minority pupils at progressively higher grade levels.
>
> "For most minority groups, then, and most particularly the Negro, schools provide little opportunity for them to overcome this initial deficiency; in fact they fall farther behind the white majority in the development of several skills which are critical to making a living and

participating fully in modern society. Whatever may be the combination of nonschool factors — poverty, community attitudes, low educational level of parents — which put minority children at a disadvantage in verbal and nonverbal skills when they enter the first grade, the fact is the schools have not overcome it.

" — In the metropolitan North and West, 20 percent of the Negroes of ages 16 and 17 are not enrolled in school — a higher dropout percentage than in either the metropolitan or nonmetropolitan South."

This identical language appears on pages 25 and 26 of Mr. Howe's "Summary" of "Equality of Educational Opportunity", published for the convenience of Congress and others.

It is obvious that this *Study* completely corroborates the Pittsburgh *Study* and the *Study* made by the University of Georgia and the testimony of all the educators who testified in this case.

But that is not all. In the October 1966 issue of *American Education,* an official publication of the U. S. Department of Health, Education and Welfare, over the names of "John W. Gardner", Department Secretary, and "Harold Howe II, Commissioner of Education", the official results of the Armed Forces Qualification Test of 2 million 18 year old inductees in 1965 were reported. It showed that 68% of Negroes examined in America are not mentally qualified to serve their country in time of war as compared with 19% of the whites.

We quote from page 4 of that magazine:

"In every state, test performance is significantly higher for whites than for Negroes. Nationally, only 19 percent of the whites fail the mental tests, compared to a failure rate of 68 percent for negroes."

Equalitarians assert that it is a "self-evident truth that all men are created equal". A "self-evident truth" is, of course, not subject to factual contradiction and everything must yield to it. The *equality clause* of the Declaration of Independence is cited as final authority. Abraham Lincoln repeated that equality clause in his Gettysburg Address. That, too, is cited as final authority for the "self-evident truth" that is false on its face.

Marxists, and many "liberals" and "moderates" and all equalitarians insist that all men and all school children are equal, and *they use that false conclusion as a basic premise* with disastrous results. A hundred *Studies* proving the contrary make no difference. They brush aside the facts, using false assumptions instead, and move to false conclusions based on these false assumptions.

A false conclusion used as a basic premise is illustrated by "A Dangerous Myth in the School Segregation Cases", 30 N.Y.U. L.Rev. 150, (1955). That article was unfortunately cited by this Court in *Jackson, etc., et al. v. Evers, et al.,* 357 F.2d 653, 654 (1966). Judge Scarlett discussed and disposed of it in this case. (See Supplemental Printed Record, p. 13).

We hope the Court will indulge an illustrative story here. It is about morons and horses.

Up in the Appalachian Mountains there were two morons. Each owned a horse. They couldn't tell them apart. To tell them apart one moron cut off one horse's tail. Tho other moron cut the other horse's tail off. Still they couldn't tell them apart. The first moron cut off one horse's left ear. The second moron cut off the other horse's ear the same way. Still they couldn't tell them apart. Finally they took the horses to an old and distinguished moron for advice. He was a Justice of the Peace and a man of parts and consequences in his neighborhood. He couldn't tell the horses apart either but he suggested that they measure them. They did and found that the white horse was six inches taller and six inches longer than the black horse. The old moron then suggested that measures are only relative and that, unlike human beings, the color of horses relates to hair and not to hide. So he advised them to race the horses. They did. The little black Arabian race horse ran twice as fast as the big white Percheron plow horse. At last the morons were very happy to be able to tell their horses apart.

However, when equalitarians heard about it, they were very unhappy. They began to call the poor morons "racists", "extremists", "reactionaries" and "segregationists". Equalitarian men of the cloth from far and wide denounced the morons, preaching:

> "It is a self-evident truth that all horses are created equal and are equal in the sight of God. Differences, if any, result from environment in which some are culturally deprived. We must

> pull down the slummy barns and build new air conditioned barns, put the culturally deprived horses in new barns and institute a headstart program so that with a headstart plow horses will be able to keep up with race horses."

The poor morons, not wishing to dispute with God about horse equality, were restored to their old state of uncertainty and unhappiness.

It is, of course, only a short step from the idea that all horses are created equal to the idea that all men are created equal, and that environment makes all differences and breeding doesn't count. Indeed these morons reasoned about their horses much like equalitarians and a few others reason about people. False conclusions postulated as basic premises is the hallmark of morons and equalitarians.

When Thomas Jefferson defaced the classic language of the Virginia Bill of Rights, written by George Mason several weeks before the Declaration of Independence, and changed Mason's phrase, "all men are born equally free and independent" to "all men are created equal", he knew that he was manufacturing false propaganda for the Revolution that had been dragging along unsuccessfully for more than a year.

Historians know that the principal reason for the Declaration of Independence was to bring France into war on the side of the faltering colonies. The half-demented Helvetius and Rousseau, described by John Adams as the "self-styled philosophers of the French Revolution", had preached the doctrine of *equality* so much and so long in France that the emotional French

peasants were chanting, "every man a king". John Adams helped Jefferson to write the Declaration of Independence. He and Jefferson knew the French people and knew how to appeal to France. John Adams referred to the "fraud" and "imposition" of the *equality clause* of the Declaration of Independence in a letter to Jefferson on July 13, 1813, and he explained it in a letter to John Taylor of Virginia on April 15, 1814. To Taylor he wrote:

> "Inequalities are a part of the natural history of man. I believe that none but Helvetius will affirm, that all children are born with equal genius.
>
> "That all men are born to equal rights is true. Every being has a right to his own, as clear, as moral, as sacred, as any other being has. This is as indubitable as a moral government in the universe. But to teach that all men are born with equal powers and faculties, to equal influence in society, to equal property and advantages through life, is as gross a fraud, as glaring an imposition on the credulity of the people, as ever was practiced . . .by the self-styled philosophers of the French Revolution. For honor's sake, Mr. Taylor, for truth and virtue's sake, let American philosophers and politicians despise it."

In his Gettysburg Address in 1863 Abraham Lincoln exclaimed:

> "Fourscore and seven years ago our fathers brought forth upon this continent a new nation, conceived in liberty, and dedicated to the proposition that all men are created equal."

President Lincoln knew that he was spreading the kind of propaganda that wars feed upon. Both Jefferson and Lincoln would be known today not only as "segregationists" and "racists" but as "extremists". Both thought that the only way to solve the Negro problem was by *transportation* from our shores. On one of the huge marble panels on the left as one enters the Jefferson Memorial in Washington, D. C., is a fragment of one of Jefferson's sentences. As inscribed upon the panel the words are, "Nothing is more certainly written in the book of fate than that these people are to be free." As written by Jefferson there was no period, but there was a semi-colon and the sentence continued, "nor is it less certain, that the two races, equally free, cannot live in the same government." (*The Jefferson Cyclopedia*, page 816.)

Lincoln told a Negro delegation that called to see him at the White House in August, 1862: "You and we are different races. We have between us a broader difference than exists between almost any other two races —. It is better for us both, therefore, to be separated." (See Pittman, *Equality vs. Liberty*, American Bar Assoc. Journal, (Aug. 1960, Vol. 46, p. 876.)

Jefferson and Lincoln *did not conceive of social segregation as a solution* to the problem created by the elevation to citizenship of a great mass of human beings who, by reason of differing culture and differing heredity, could not be assimilated. The solution to that problem was left to the experience of those people who were forced to live with the problem. That solution was

not perfect but it was better than the solution offered by Jefferson and Lincoln which would have required loading them in New England ships for transportation elsewhere.

The facts with regard to human differences and the propaganda, the fictions, "frauds" and "impositions" implicit in the doctrine that all men are created equal are such that they may not be adequately discussed at this time and place. The August 1960 issue of the *American Bar Association Journal* published an article by the writer of this brief on the subject cited above. The December 1963 issue of the *North Carolina Law Review* published "A Symposium" consisting of articles on "Civil Rights". Senators Sam J. Ervin, Jr., Senator Robert F. Kennedy, Charles J. Bloch, the writer of this brief and several others contributed articles. The writer's article entitled "The Blessings of Liberty vs. The Blight of Equality" also deals with the subject we are now considering.

[NOTE: If it be thought unseemly for the writer of this brief to cite his own articles, he pleads that Justices of the Supreme Court have frequently cited some of his articles also. For a late citation, see opinion of Chief Justice Warren in *Miranda vs. Arizona*, 384 U.S. 436, 459 (1966); 86 S.Ct. 1602, 1620, Footnote 29.]

In the ABA Journal article, it was pointed out that our Constitution and the Constitutions of all free republics of the world postulate *liberty and freedom* as the basic premises upon which they stand. Only four Constitutions, so far as we could find, postulated *equality* as their base and all of them were Communist constitutions. The Preamble to our federal Constitution

recites that it was established to "secure the blessings of liberty to ourselves and our posterity". Not a single delegate to the Constitutional Convention of 1787 thought otherwise. The views of all the men who wrote the federal Constitution on the subject *of equality vs. liberty* was expressed by Alexander Hamilton on the floor of the Convention on June 26, 1787, when he said:

> "Inequality will exist as long as liberty exists. It unavoidably results from that very liberty itself."

Even today we sell "Liberty Bonds" and "Freedom Shares", deceitfully to raise money to squander on senseless equality projects. No one has ever heard of an "Equality Bond"! Depravity has not reached that level yet.

Liberty and equality have never co-existed at any time or place in the history of the world. To build one, the other must be destroyed. Equalitarians concede that to be true. Chief Justice Warren learned that when preparing to write the opinion in *Brown vs. Board of Education*. The equalitarian, Gunner Myrdal, who was brought from what he described as a "non-imperialistic" country to this "imperialistic" country by the Marxist controlled Carnegie Foundation, to write a book entitled "An American Dilemma", says on page 9 of that book, that there is an "inherent conflict between equality and liberty" and "equality is slowly winning" by "a landslide". Chief Justice Warren's opinion (see *Brown vs. Board of Education*, 347 U.S. 483, 494 (1954); 74 S.Ct. 686, 692, Footnote 11) cited that book and its views as "modern authority" for the school decision of 1954.

In the *Brown* decision of 1954 (347 U.S. 691) the Court could not bring itself to the point of proscribing classification by mental qualifications. It said:

> "To separate them from others of *similar age and qualifications solely because of their race* generates a feeling of inferiority as to their status in the community that may affect their hearts and minds in a way unlikely ever to be undone."

The Court then pronounced separate schools to be "inherently unequal", as if that makes a difference. Integrated schools are likewise "inherently unequal". Every judge and every lawyer is "inherently unequal" to any other. Constitutions establish "inferior" courts, "superior" courts, and "supreme" courts. Who ever heard of a judicial system in which all courts are equal?

Two leaves from the same tree are "inherently unequal" as are two children from the same family, except "identical twins", and they are never "identical". Their mothers can always tell that "one is a little more identical than the other".

V. GUIDELINES, THEIR AUTHOR AND THEIR SANCTITY

In the late case of United States vs. Jefferson County Board of Education, 372 F.2d 836 (1966), and the companion cases, this Court held that in the formulation and evaluation of desegregation plans, district courts should follow, with few exceptions, the guidelines promulgated by the Office of Education, under

Harold Howe II. We have searched diligently and have been unable to find any case in which any evidence was offered as to the competence or expertness of Harold Howe II as an "educator" or a promulgator of "guidelines".

A court has as much justification to assume him to be an incompetent moronic shoe clerk, without evidence, as it has to presume him to be a competent "educator", without evidence. If "guidelines" are to bind us, we ought to be permitted to examine and cross-examine the qualifications of their author and the author himself.

In our search for materials to use in such a cross-examination, if due process should be accorded to our clients and we are permitted to cross-examine, we made a preliminary investigation. Since Harold Howe's qualifications are presumed on considerations outside of any court record, we feel justified in disclosing the results of our investigation *de hors* the record.

Life magazine of February 10, 1967, carries a feature article about Mr. Howe entitled "TOUGH, BLUNT MASTER OF U. S. SCHOOLS". Apparently Mr. Howe had much to do with the writing of that article and with the emphases appearing therein. The story carries a full page bust photo of Mr. Howe and several smaller photographs of him. One photograph shows Mr. Howe and his fourteen year old son, Gordon. The article quotes Mr. Howe as saying, *in italics,* that after the Civil War both his grandmother and grandfather went South to teach Negroes. If they offered to teach poor white children, Mr. Howe didn't tell it. Apparently that fact was stated by Mr. Howe to demonstrate his

genetic background in the field of education and to state a genetic basis for his bias. To be the grandson of two carpetbaggers is truly a distinction. Mr. Howe thought so or he wouldn't have written it for public consumption.

Since his son, Gordon, is of public school age, it was natural to expect that he is enjoying the benefits of his father's guidelines in Washington. Upon inquiry, we learned that in the school year 1965-66 young Mr. Howe did attend Gordon Junior High School at 35th and T Streets, N.W., near his home in Northwest Washington. The number of white students materially exceeded the number of colored students in that school last year, which made the school a rarity. Mr. Howe's son finished Gordon Junior High in the spring of 1966. The school to which graduates of Gordon Junior High normally go is Western High School at 35th and R Streets, N.W. Enrollment figures at Western, October 1966, were, white students, 564 and negro students, 815.

Upon inquiring about Gordon at Western, we learned that Mr. Howe did not permit his son to attend the Washington integrated school, but he sent him to Taft School in Connecticut where there are no Negroes.

In Life's "Close-Up" article about Mr. Harold Howe II, he is quoted as having said, "I have always thought that schools should be in a state of controlled unhappiness." Apparently he could not control "unhappiness" in the integrated Washington Schools, so he took his own son out and put him in a school where "unhappiness" can be controlled.

To equalitarians and to men who act on false and unfounded assumptions, truth is always cruel. Hypocrisy withers in the light of truth. The future of our children, our European culture, and our American civilization is being sacrificed on the altar of "equality" by midget-minded equalitarians sitting on bureaucratic thrones, who preach one way and practice another.

When the Court said in *Brown* that those of the "same educational qualifications" may *not* be segregated "solely because of race and color", it laid the basis for the defense of the *Savannah School Case*. The Supreme Court knew and this Court knows that the right to separate because of differing mental or "educational qualifications" is the first essential of an effective educational program. Those who advocate indiscriminate mixing of school children regardless of their educational qualifications are just not interested in education.

VI. CONCLUSION

"[T]his is in no way an ordinary school case", says plaintiffs' counsel, (p. 16 of their Brief) and we agree. The way to make it one is to use false slogans and false conclusions as basic premises and reason therefrom to false and unjust results.

It is respectfully urged that this case should be affirmed for the reasons stated here and for the reasons stated by Judge Scarlett.

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